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No. 89-431

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit**

BRIEF OF RESPONDENT

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**PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1989
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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether federal courts have exclusive jurisdiction of employment discrimination cases brought under 42 U.S.C. Sec. 2000e, *et seq.*, Title VII of the Civil Rights Act of 1964.

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No. 89 - 431

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YELLOW FREIGHT SYSTEM, INC.,*Petitioner,*

vs.

COLLEEN DONNELLY,*Respondent.*

**On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit**

BRIEF OF RESPONDENT**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on April 28, 1989 and is reported at 874 F.2d 402. Appendix to Petition for Certiorari [hereafter A-____] at A-1 to A-19. Defendant's petition for rehearing was denied. [A-20]. The decision of the United States District Court for the Northern District of Illinois was handed down on March 17, 1989 and is reported at 682 F.Supp. 374. [A-23 to A-25].

The Report and Recommendation of the United States Magistrate entered on December 10, 1987 [A-26 to A-34] and the opinion of the District Court entered on November 22, 1985 [A-35 to A-39] on the issue of jurisdiction were not reported. The agreed order entered in the Circuit Court of Cook County, Illinois on August 9, 1985, was not reported. [A-40, A-41].

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 1989. The petition for rehearing filed by Yellow Freight System, Inc., was denied on July 17, 1989. The petition for certiorari was filed on September 11, 1989. This Court on November 6, 1989 granted certiorari as to Question One raised in the petition. This Court has jurisdiction of this matter pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The following statutory sections are set out in the Petition at pages 3 through 7:

42 U.S.C. Sec. 2000e-5(f) [Section 706(f) of Title VII];

42 U.S.C. Sec. 2000e-5(j) [Section 706(j) of Title VII].

STATEMENT OF THE CASE

This case arises out of a claim, later admitted, that petitioner Yellow Freight System, Inc., [Yellow Freight] discriminated against respondent Colleen Donnelly [Donnelly] on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, *et seq.* Donnelly applied for work with Yellow Freight in 1982. [Tr. 13, 14]. Yellow Freight's manager informed her that the company was not hiring but that she would be the first hired when the next opportunity arose. [Tr. 15]. She called that manager every week, as directed, to check for a job opening. [Tr. 16]. The manager falsely told her that Yellow Freight was laying off rather than hiring. [Tr. 33, 34]. The persons hired during that period were all male. [A-27].

Donnelly searched for other jobs, and obtained a part-time job in November of 1982. [Tr. 16-21, 29]. She filed a charge against Yellow Freight with the Equal Employment Opportunity Commission [EEOC]. Two charges were actually filed, with the second complaining of harassment after being hired. The latter charge (R. 32 at Ex. C) filed in October of 1984 was later disposed of by summary judgment and is not in issue. [The Seventh Circuit opinion recited that the charges were filed in March of 1985 (A-2), but that could not be correct in view of the date of the second charge and the fact that the right to sue letters were issued in that month. The Magistrate's Report shows that the first charge preceded her employment by Yellow Freight in June of 1984. [A-27]. This discrepancy does not bear on the question on review.] After the filing of the charge, Yellow Freight hired her. [A-27].

The EEOC on March 15, 1985 issued to Donnelly notice of the right to sue. [A-3; Joint Appendix (hereafter J.A.) at 11]. The Notice of Right to Sue notifies the recipient that he or she has a right to sue and that the right must be exercised within 90 days of receipt. [A-11]. The notice on its front page did not designate the court in which suit had to be filed nor did it preclude any particular forum.

On May 22, 1985, within the 90 day limitation period, Donnelly filed suit in the Law Division of the Circuit Court of Cook County, Illinois. [J.A. 5]. The complaint alleged that Yellow Freight had discriminated against plaintiff on the basis of her sex, in violation of the Illinois Human Rights Act, Ill.Rev.Stat. ch. 68, par. 1-1-1, *et seq.* (1983). The right to sue letters were attached as exhibits. [J.A. 5]. On June 25, 1985, Yellow Freight filed a motion to dismiss on the grounds that Donnelly had failed to exhaust her administrative remedies. [J.A. 19]. Donnelly then filed a motion requesting leave to file an amended complaint adding further civil rights claims; it specifically alleged violation of Title VII, 42 U.S.C. Sec. 2000e, *et seq.*, and Section 1983, 42 U.S.C. Sec. 1983. [J.A. 22, 23, 25]. Yellow Freight responded to that motion. [J.A. 36]. Next, an agreed order was entered on August 8, 1985 dismissing Donnelly's complaint with prejudice and continuing the motion for leave to file an amended complaint. [A-40]. On August 14, 1985, Yellow Freight filed a petition for removal. [R. 1].

Donnelly obtained leave in District Court [R. 6] to file an amended complaint which alleged violation of Title VII. [J.A. 42]. The court denied Yellow Freight's motion to dismiss that complaint. [A-35]. Yellow Freight answered and asserted affirmative defenses including failure to state a cause of action, lack of subject matter jurisdiction, un-

timely filing under Section 706(j) of Title VII/42 U.S.C. Sec. 2000e-5(j), and accord and satisfaction by reason of accepting employment. [R. 15]. Count II of that complaint arose out of conduct occurring after employment and was disposed of by summary judgment. [R. 36, 37].

The matter was tried before a magistrate. Yellow Freight admitted that it had discriminated against Donnelly in violation of Title VII, and a trial was had to determine damages. Donnelly was awarded back pay, retroactive seniority, pension contributions, attorneys's fees and prejudgment interest. [A-26]. The District Court adopted all of the magistrate's findings and conclusions with the exception of the award of prejudgment interest. [A-23]. Yellow Freight did not raise or obtain a ruling on its affirmative defenses.

On appeal, the Seventh Circuit [Chief Judge Bauer, with Judge Cummings and Judge Easterbrook concurring] unanimously affirmed the judgment and restored the award of prejudgment interest. [A-1]. Citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477, 478, 101 S.Ct. 2870 (1981), the Court agreed that state courts might presume concurrent jurisdiction over a federal cause of action unless Congress included in the statute an explicit statement vesting jurisdiction exclusively in federal court. [A-5]. The Seventh Circuit found that Title VII did not expressly give the federal courts exclusive jurisdiction. [A-6].

The Court then applied *Gulf Offshore* and held that the legislative history of Title VII did not show an unmistakable implication of exclusive federal jurisdiction, and that there was no disabling incompatibility between Donnelly's federal claim and state court adjudication of that claim. [A-7, A-9]. The Court noted that Title VII was never intended to be the exclusive remedy for employment dis-

crimination, and that state courts routinely adjudicated discrimination claims under state and federal civil rights laws. [A-8, A-10]. The Court therefore concluded that the principles of federalism mandated that jurisdiction of claims arising under Title VII be shared.

The Court further held that the amended complaint filed in the District Court related back to the original action by virtue of F.R.C.P. 15. [A-15]. The original action had been timely filed within 90 days of receipt of the right to sue letter. Donnelly's Title VII action was therefore not time barred.

Yellow Freight filed a petition for rehearing with a suggestion for rehearing en banc by the Seventh Circuit. That was denied on July 17, 1989. No judge requested a vote on the suggestion for rehearing en banc, and all the judges on the original panel voted to deny rehearing. [A-1, A-20, A-21]. Yellow Freight's petition for certiorari was granted by this Court on November 6, 1989.

SUMMARY OF ARGUMENT

I.A. This case is governed by the presumption that state courts enjoy concurrent jurisdiction with federal courts over claims based on federal laws. The parties agree that Title VII does not expressly reserve jurisdiction over Title VII claims to the federal courts and that *Gulf Offshore Company v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) provides the controlling legal principle. Pet. br. at 5, 10. Therefore state courts have concurrent jurisdiction over Title VII claims unless there is either an unmistakable contrary implication in the legis-

lative history or a clear incompatibility between concurrent jurisdiction and the federal interest.

I.B. The Act on its face mandates extensive state involvement in claim adjudication. It gives state agencies initial exclusive jurisdiction over claims, and allows the Equal Employment Opportunity Commission to defer entirely to state agencies. State court findings as to state claims must be given preclusive effect by federal courts. Title VII supplements, rather than supplants, state remedies for employment discrimination. Limiting the forum for adjudication of civil rights claims, as Yellow Freight proposes, would therefore stand in contradiction to the Act's expansive mechanism.

I.C. Title VII's legislative history does not contain a single statement that state courts were not to have jurisdiction over Title VII actions. Legislators' statements referred to by petitioner reflect an assumption that claimants would want to use the federal courts. However, that does not in any way lead to Yellow Freight's conclusion that Congress intended to preclude state court involvement. Title VII was chiefly aimed at those areas without state fair employment protections. Legislators assumed that claimants in those areas might not want to use state courts which might be hostile, and thus spoke in the belief that claimants had to be ensured access to federal courts. However, the history shows that they never implied that claimants would be compelled to use federal courts or restrained from using state courts.

I.D. State courts will have no difficulty in adjudicating Title VII cases. State courts not only routinely hear discrimination claims arising under state laws, but also routinely adjudicate civil rights claims arising under federal law. State agencies work hand in hand with the EEOC and

the EEOC can cede to states all rights to enforce federal claims. The establishment of this state/federal relationship rebuts any suggestion that state court jurisdiction is incompatible with federal interests. Nor is there any reason to believe that state courts would be hostile to such actions. As the Seventh Circuit pointed out [A-10], it is hard to imagine that state courts would be receptive to Section 1983 civil rights actions but hostile to Title VII actions.

II. In any event, the judgment in favor of the respondent must be affirmed for other reasons. Petitioner admitted liability and its limitation defense was waived. Further, the filing of the amended complaint related back to the timely filed state action, and the running of the limitation period was equitably tolled, just as it was in *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170 (9th Cir. 1986).

ARGUMENT

I.

STATE AND FEDERAL COURTS EXERCISE CONCURRENT JURISDICTION OVER EMPLOYMENT DISCRIMINATION CLAIMS ARISING UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT, 42 U.S.C. SEC. 2000e, ET SEQ.

A. The parties agree with the Seventh Circuit holding that the question is controlled by *Gulf Offshore* and that Title VII does not explicitly provide for exclusive federal jurisdiction.

In *Gulf Offshore Company v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), this court reiterated and refined the criteria which determine whether state courts are to exercise concurrent jurisdiction over a claim arising under federal law. This Court first stated the general governing principle:

The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication. *** In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. *Gulf Offshore, supra*, at 478, 2875.

For Yellow Freight to prevail in this case, it must rebut the presumption of concurrent jurisdiction. The presumption can only be rebutted:

... by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. *Gulf Offshore, supra*, at 478, 2875.

In the instant case, the Seventh Circuit concluded [A-6] and petitioner Yellow Freight does not dispute [pet. br. at 5] that the statute does not contain an explicit directive providing for exclusive federal jurisdiction of claims arising under Title VII. Therefore state courts enjoy concurrent jurisdiction unless the legislative history shows a contrary unmistakable implication, or unless there is a conflict between such jurisdiction and the goal of Title VII. The Seventh Circuit correctly held that neither of those exceptions was established.

B. Title VII on its face defers to the states for management of both state and federal employment discrimination claims. Restricting adjudication of Title VII claims to a federal forum would stand in contradiction to that statutory mechanism.

Contrary to Yellow Freight's method of analysis, the statute itself can first be profitably examined. The statute

on its face defers to the states for management of both state and federal employment discrimination claims. Title VII assumes a pivotal state role. As noted in *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54, 68, 100 S.Ct. 2024, 2032, 64 L.Ed.2d 723 (1980), Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In determining whether employment discrimination exists, the EEOC must give "substantial weight" to the findings and the orders entered by state and municipal agencies in state and local employment discrimination actions. 42 U.S.C. Sec. 2000e-5(b). Where the state or municipality has a fair employment plan [FEP] in place which regulates the conduct being complained of, the federal agency must defer to the state or municipal process for a period of 120 days. 42 U.S.C. Sec. 2000e-5(c). No charge may be filed with the EEOC until that time period has expired. Where the EEOC itself files a charge, it must defer to the local agency and allow such agency a reasonable time to remedy the practice complained of. 42 U.S.C. Sec. 2000e-5(d).

The EEOC can turn the entire enforcement mechanism over to the state in certain situations. 42 U.S.C. Sec. 2000e-8(b), Section 709(b) of the Civil Rights Act of 1964. The EEOC is empowered to enter into workshare agreements with states whereby the EEOC defers entirely to the state agency. The federal agency can include in such an agreement a provision precluding the filing of a federal action. 42 U.S.C. Sec. 2000e-8(b), Section 709(b) of Title VII of the Civil Rights Act of 1964; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 496, 102 S.Ct. 1883, 1897, 1905, 72 L.Ed.2d 262 (1982) (dissent). In that situation, adjudication of employment discrimination claims based on federal law rests entirely with the state.

The entire thrust of the Act is to involve federal, state and local agencies in the effort to alleviate discrimination. At each step, each agency or court must work in conjunction with or defer to the other actors in the enforcement mechanism. The majority in *Kremer* noted at 477 that state FEP laws were explicitly made part of the Title VII enforcement scheme. In fact, this Court has ruled that federal courts must give preclusive effect to the findings of state FEP agencies where those findings are affirmed in state courts. *Kremer v. Chemical Construction Corp.*, *supra*, at 476, 478. The same preclusion principle operates in civil rights cases brought under Section 1983, 42 U.S.C. Sec. 1983. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 476, 102 S.Ct. 1883, 1895, 72 L.Ed.2d 262 (1982). The findings of state courts are thus binding on the federal courts and can prevent an aggrieved employee from instituting a civil rights action in federal court. See also, *University of Tennessee v. Elliott*, 478 U.S. 788, 792, 106 S.Ct. 3220, 3222, 92 L.Ed.2d 235 (1986) (citing *Kremer*).

The Act thus contemplates state court involvement and Title VII claims should logically be heard by state courts. In that fashion the claimant does not run the risk of having the federal claim precluded without an opportunity to raise his federally-based contentions, and the state court has the benefit of the full range of corrective measures provided by the combination of state and federal law. It would be anomalous to construe the Act so as to create a system requiring claims based on state law to be heard first but barring Title VII claims based on those same facts whenever the state court affirms the state agency finding. The consequence of petitioner's contrary contention would be piecemeal litigation of claims arising out of the same core of facts and essentially based on the same premise.

C. Title VII's legislative history does not rebut the presumption in favor of concurrent jurisdiction.

One thing is clear. To the best knowledge of respondent, no legislator ever stated or implied that an employee was to be precluded from using a state court forum. No one ever questioned an employee's right to ultimately file a case in a state court, and the sponsors of the bill never commented on that possibility. Yellow Freight has not been able to point to one instance in the legislative history in either 1964 or 1972 where concurrent state court jurisdiction was either questioned or challenged. The absence of any such commentary establishes that the legislative history falls far short of showing an "unmistakable implication" against concurrent jurisdiction.

Yellow Freight's contention, i.e., that the legislative history is hostile to state court jurisdiction, is weakened at its outset by the absence of authoritative legislative reports. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 471 (fn. 9), 102 S.Ct. 1883, 1892, 72 L.Ed.2d 262 (1982). Much of the normal debate which crystallizes issues and from which intention can be inferred was absent. Beginning with the House Bill, which the Senate subsequently extensively amended, opponents complained that the Judiciary Committee which reported H.R. 7152 did not hold hearings. Bureau of National Affairs, *The Equal Employment Opportunity Act of 1972*, p. 26 (1973).

When that bill was sent to the Senate, a substitute bill [the Dirksen-Mansfield amendment] substantially modified it. That substitute did not go through the customary committee procedure. Instead, the substitute was worked out in informal conferences guided by party leaders from both sides of the political fence. Introduction, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*,

U.S. Equal Employment Opportunity Commission, at 3001 [hereafter cited as *Legis. His.*]. As a result, there was no Senate committee report. The bill pended in the Senate for a long time [Bureau of National Affairs, *The Equal Employment Opportunity Act of 1972* (1973) (hereafter BNA), at 27], but was the target of filibuster rather than constructive discussion. 110 Cong. Rec. 13079 (1964).

If the bill had been returned to the House with any unacceptable changes, it would have gone to conference committee and there would have been the threat of a second filibuster. To avoid that threat, Senate amendments were first approved by a floor leader in the House as part of that informal and thus unrecorded procedure. Statement of Sen. Clark, *Legis. His.* at 3010, 3074, 110 Cong. Rec. 7215, 12600 (1964). When the bill was returned to the House, it did not go to conference. Instead, the Senate amendments had to be voted on as a whole, with House debate limited to one hour. *Legis. His.* at 3063, 3064, 110 Cong. Rec. 15874 (1964); See BNA, p. 27. The usual indicia of legislative intent is thus missing in the legislative history. Editorial Introduction, *Legis. His.* at 3001.

The legislators were aware of the principle of exclusive jurisdiction, but never acted to apply the principle so as to preclude claims being brought in state court. If exclusive jurisdiction was raised, it was in the context of giving it to the states. Senator Dirksen, in his annotated version of the House bill, noted that a state with an FEP in place was given "exclusive jurisdiction" over the dispute for a limited period of time. *Legis. His.* at 3019, 110 Cong. Rec. 12819 (1964). That was presumably in response to an initial demand by some legislators for exclusive state jurisdiction, without right of federal intervention, where a state had enacted FEP laws. Senator Case

in his interpretive memorandum stated that such unlimited exclusive state jurisdiction would be impossible for technical reasons. Legis. His. at 3044, 110 Cong. Rec. 7214 (1964).

In the same vein, Senator Javits placed into the Record a report from the Association of the Bar of the City of New York. Legis. His. at 3090, 110 Cong. Rec. 8456 (1964). The Bar raised the question of whether federal law should entirely supercede state law in this area. It noted the likely volume of cases, and concluded by concurring with the proposed legislation which mandated parallel municipal, state and federal involvement and enforcement rather than federal preemption.

The question of precluding state jurisdiction was never explicitly or implicitly raised, despite the above comments which should have triggered such discussion if preclusion was intended. There are several likely explanations for this, none of which lead to the conclusion that Congress intended to bar state judicial involvement. First, the legislation itself was primarily intended to address a problem viewed as regional. At that time, many municipalities and states had viable and effective FEP laws and procedures. For example, Senator Saltonstall noted the effectiveness of the Massachusetts's program. Legis. His. at 3311, 110 Cong. Rec. 14191 (1964). Both proponents and opponents were aware of that. The southern region had no FEP laws at that time, and the south correctly perceived this bill as being directed at them. Comment of Sen. Clark, Legis. His. at 3344, 110 Cong. Rec. 7205 (1964); Comment of Sen. Ellender, Legis. His. at 3072, 110 Cong. Rec. 12599 (1964).

The target region was at that time thus viewed by many as being hostile to civil rights and to federal intervention. Regional animosity in that regard was evidenced

by exchanges of charges and denials. See, e.g., Comment of Sen. Clark, Legis. His. at 3072, 110 Cong. Rec. 12599 (1964). Southern opponents argued that there was no need for federal intervention, and proponents noted that the people with the greatest need for employment protection lived in states without state FEP laws. Interpretive memorandum of Sen. Clark and Sen. Case, Legis. His. at 3045, 110 Cong. Rec. 7214 (1964).

Given that background, legislators likely spoke with the assumption that persons discriminated against might need access to more amicable federal courts. However, they evidenced no intent to preclude state court jurisdiction. Congress wanted to expand civil rights in the employment arena and insure access to federal courts but, contrary to Yellow Freight's implication, there is no evidence that Congress wanted to limit the forum to be used for enforcement of the expanded remedy.

The absence of discussion as to whether state or federal forums were preferred is not remarkable when considered in light of the focus of the argument. The primary issue was whether the new civil rights were to be enforced by an agency or by the courts. BNA, at 25. A report from the Committee on Education and Labor on an earlier bill noted that American jurisprudence mandated that the judicial determinations be made by the judiciary rather than by an investigating agency. Legis. His. at 2160. Later, H.R. 405 provided for enforcement in federal court but was then modified to provide enforcement procedures similar to those used by the National Labor Relations Board. Editorial introduction, Legis. His. at 9. The Senate Bill [S. 1937] provided for an agency which would issue cease and desist orders enforceable in the federal courts of appeal. Editorial introduction, Legis. His. at 9; Comment of Sen. Clark, Legis. His. at 3068, 110 Cong. Rec.

12596 (1964). The points of difference in this argument were pointed out in a comparative analysis prepared by Sen. Clark's staff of Senate bill S. 1937 and H.R. 7152, the latter of which ultimately passed. Legis. His. at 3068, 3070, 3071, 110 Cong. Rec. 12596-12598 (1964).

Ultimately, compromise resulted in the enactment of a civil rights act which created a commission [the EEOC] without direct enforcement powers. Enforcement would be accomplished by means of suits brought by the EEOC or by the aggrieved employee.

In 1972, Congress again focused on the nature of the enforcement mechanism and not on the forum, and again no one stated or implied that claimants were to be precluded from using state courts. Congress deemed the 1964 Act flawed because the EEOC did not have meaningful enforcement power. Bureau of National Affairs, *The Equal Employment Opportunity Act of 1972*, Report of Senate Committee on Labor and Public Welfare, at 225 (hereafter 1972 Legis. His.) (1973); Statement of Rep. Erlenborn, Hearings Before the Subcommittee on Labor, Oct. 6, 1971, at 169. Congress therefore gave the EEOC the right to bring a civil suit in most cases, and also ultimately transferred jurisdiction to bring certain court actions from the Attorney General to the EEOC. BNA, at 2, 3, 28. In addition, a "substantial weight" requirement was added because the EEOC was not giving sufficient deference to state administrative decisions made under state FEP laws. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 471 (fn. 8), 102 S.Ct. 1883, 1892, 72 L.Ed.2d 262 (1982).

As in 1964, the proponents of the judicial forum prevailed over the proponents of agency action in 1972. And as occurred in 1964, no legislator argued or implied that Title VII claimants were to be precluded from access to

state courts. The right to bring a private action, which is actually all that is at issue in this appeal, was unchanged. Section 706(f)(1) gave an employee the right to file suit, but that section notably did not limit or prescribe the court wherein such a suit was to be filed.

A remark cited in petitioner's brief at 25 sheds light on the failure of Congress to distinguish between federal and state jurisdiction. Obviously not all civil actions are filed in a federal court. Nevertheless, Senator Ervin remarked that the bill's intent was to have the validity of charges determined not by an agency but by the district courts "as in all other civil actions". 1972 Legis. His. at 975, 118 Cong. Rec. 1511 (1972). He thus spoke as if all civil litigation went to the federal court.

This type of remark shows that the legislators viewed the judiciary in a generic sense because they were comparing that mechanism to the agency mechanism. That explains why there were frequent references to federal court but no statements precluding state court involvement. The point is that legislators blurred that distinction because their focus was solely on the court versus agency issue in 1972, just as it was in 1964. The failure to acknowledge that distinction is further illustrated by Senator Case's response to a question in 1964. He said that the right to a jury trial in Title VII cases would vary in each jurisdiction and was dependent on whether there were separate equity and law dockets. Legis. His. at 3295, 3296, 110 Cong. Rec. 7255. Significantly, that type of docket separation at that time was a characteristic of only state and not federal courts. Law and equity were united in the federal courts in 1938. See Notes of Advisory Committee, F.R.C.P. 1.

The failure to specifically prescribe or preclude courts is further explained by the fact that the legislators did not expect significant court involvement by individual claimants. The EEOC was intended to provide for conciliation. Statement of Sen. Case, Legis. His. at 3277, 110 Cong. Rec. 7242 (1964). Experience taught that most grievances could be resolved through mediation. See Comment of Sen. Saltonstall, Legis. His. p. 3311, 110 Cong. Rec. 14191 (1964). The majority of suits were expected to be brought by the Attorney General rather than by employees. Answer of Sen. Case, Legis. His. at 3296, 110 Cong. Rec. 7255 (1964). Judicial intervention was to be the exception. Report of House Committee on Education and Labor, re H.R. 10144, Legis. His. at 2160.

Examination of the history thus rebuts the contention of *Yellow Freight* that Congressional references to the federal courts must be read to imply rejection of concurrent state jurisdiction. The grant of jurisdiction to the federal courts did not oust jurisdiction from the state courts. *Gulf Offshore Company, supra*, at 479, 2875; *Lindas v. Cady*, 150 Wis.2d 421, 441 N.W.2d 705, 708 (1989) (concurring with *Donnelly* and rejecting *Valenzuela* on all points). By the same token, reference to the use of federal courts did not indicate any intent to preclude state court jurisdiction. That conclusion is affirmatively supported by the legislative history.

The legislative history actually implies extensive state involvement. In a preliminary bill [H.R. 10144], the House Labor Committee noted its intent to respect the rights of the states and to provide for cooperative action between state and federal agencies. Report of House Committee on Education and Labor, Legis. His. at 2162. Senator Clark initially emphasized that the 1964 bill was drafted so "that the States and the Federal Government

can work together. When the bill is enacted, the State and the municipal agencies will continue to operate, and State laws will continue in force, except where they are inconsistent with title VII." Legis. His. at 3344, 110 Cong. Rec. 7205 (1964). The state and federal governments were to cooperate and thus provide a saving of effort by the federal government where state laws remedied the problem. Legis. His. at 3345, 110 Cong. Rec. 7205 (1964). Proponents intended to give the EEOC the power to cooperate with and to utilize state agencies. Interpretive memorandum of Sen. Clark and Sen. Case, Legis. His. at 3043, 110 Cong. Rec. 7213 (1964).

Title VII was to mesh with local and state FEP laws. Comment of Sen. Clark, Legis. His. at 3345, 110 Cong. Rec. 7205 (1964). In describing the changes wrought by his substitute bill, Senator Dirksen noted that the states would initially be given exclusive jurisdiction. Legis. His. at 3019, 110 Cong. Rec. 12819 (1964). The federal law was not intended to override any state law, and the federal authorities would "stay out of" any state or locality with an effective FEP. Answer of Sen. Clark to Sen. Dirksen's memorandum, Legis. His. at 3012, 110 Cong. Rec. 7216 (1964); 42 U.S.C. Sec. 2000e-7 [Section 708 of the Civil Rights Act]. That is commensurate with the principles of federalism, and such comments refute the contention that Congress was hostile to state involvement in adjudication of Title VII claims.

The Seventh Circuit correctly concluded that state and federal courts were intended to share Title VII jurisdiction. The contrary Circuit Court cases relied upon by petitioner can be readily distinguished by their failure to consider the *Gulf Offshore* criteria, by their lack of analysis, or as dicta. In *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984), the court at 436 concluded that the presence

of legislators' references to federal courts and the absence of references to state courts "suggest[ed]" an intent to make federal jurisdiction exclusive. However, a "suggestion" is not sufficient under the *Gulf Offshore* test.

That court also relied on the presence in the Act of two procedural directives, i.e., 42 U.S.C. Sec. 2000e-5(j) [providing that any action brought under it was subject to appeal as provided in the statutes [28 U.S.C. Sec. 1291, 1292] which give appellate jurisdiction to the federal circuit courts] and 42 U.S.C. Sec. 2000e-5(f)(2) [referring to F.R.C.P. 65]. The first provision simply makes clear that further appeal is appropriate. That does not mean that the same appeal could not be taken in a state court system. As the dissent noted in *Kremer*, procedures available in state court closely approximate those available in federal court [*Kremer v. Chemical Construction Corp.*, *supra*, at 495 (dissent)], and that analysis applies with equal validity to state appellate procedures. The second provision, i.e., reference to Rule 65, simply addresses injunctive procedure and is not dissimilar from the practice in state courts. Nothing in the history implies that this reference was meant to preclude state court jurisdiction. The Seventh Circuit characterized these as "procedural directives", and they do not control the substantive directives of the Act.

The absence of analysis in the other cited Circuit opinions is reflected in the opinion in *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3rd Cir. 1986). The question of concurrent jurisdiction was not at issue and thus was presumably not briefed. It was only raised by the court at oral argument. The reviewing court's holding was without any analysis. The court went on to note [fn. 3 at 113] that even if concurrent jurisdiction existed, the plaintiff was unlikely to prevail for other reasons.

Yellow Freight also again pointed to *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986). Certiorari was denied as to the plaintiffs' petition [484 U.S. 820, 108 S.Ct. 78] but was granted as to certain questions raised by defendant [484 U.S. 814, 108 S.Ct. 65]. This Court subsequently reversed [*Florida v. Long*, 487 U.S. 223, 108 S.Ct. 2354, 101 L.Ed.2d 206 (1988)] although on grounds other than the point recited by Yellow Freight. The Circuit Court mentioned exclusive jurisdiction only in the context of applying res judicata. That court stated, without analysis, that res judicata was not applicable because the plaintiff could not have brought his Title VII claim in state court. The Eleventh Circuit apparently accepted a Florida appellate court's unsupported statement in an earlier state court case. See *Long v. Dept. Admin., Div. of Retirement*, 428 So.2d 688 (Fla. Dist. Ct. of Appeal 1983). That reliance may have been misplaced, as another division of that state court later upheld concurrent jurisdiction in an opinion which noted that the *Long* court later switched philosophy and found concurrent jurisdiction with respect to Section 1983 claims. *Jesson, Inc. v. Tedder*, 481 So.2d 554 (Fla. D. Ct. of App. 1986), review den. 491 So.2d 279 (1986).

Finally, in *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986), the only question before the Tenth Circuit was whether state claims could be pendent claims in a Title VII action. The court answered in the affirmative at 552. The court then noted that its inquiry could end there, but discussed the matter further and cited *Valenzuela* without discussion. Again, the question was presented in an indirect context, apparently without benefit of briefs, and the holding was dicta. The only other contrary circuit opinion was that in *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985). The Ninth

Circuit raised the jurisdictional question sua sponte after removal and simply followed its prior ruling in *Valenzuela*. This later decision by a different panel was seemingly without enthusiasm, as reflected in its analysis and comment at 1393.

Yellow Freight also relied on two pre-amendment cases, *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 310 (5th Cir. 1970) and *Bowers v. Woodward & Lothrop*, 280 A.2d 772, 774 (D.C. Ct. App. 1971). The *Hutchings*' opinion holds simply that the EEOC filing limitation was tolled by invocation of a contractual grievance remedy. The point that the court was making at 310 was that a court, rather than an agency [the EEOC], had the power to enforce Title VII rights. As occurred in the legislative debate, the court's focus was on the agency versus court enforcement mechanism. That court was not asked to determine whether jurisdiction was exclusively federal.

In *Bowers*, the plaintiff employer sued for an indebtedness and the employee countersued for backpay. The employee claimed that he was discharged after an altercation, in violation of the Civil Rights Act, but the opinion does not state which Act was pleaded. The court simply noted at 774 without discussion or analysis that jurisdiction of Title VII claims was in the EEOC or the federal court, and that the trial court had no jurisdiction. Presumably the court meant that, as with the grievance rights, the employee had not presented them to the EEOC and had thus waived them.

If Yellow Freight is correct in its contention that the legislative history shows an unmistakable implication of exclusive federal jurisdiction, it should follow that there would be unanimity on that question. To the contrary, numerous courts have disagreed with petitioner's claim.

See [Federal] *Boyle v. Carnegie-Mellon University*, 648 F.Supp. 1318 (W.D. Pa. 1985); *Greene v. County School Board*, 524 F.Supp. 43 (E.D. Va. 1981); *Bennun v. Board of Governors*, 413 F.Supp. 1274 (D.C. N.J. 1976); *Peterson v. Eastern Airlines, Inc.*, 20 FEP Cases 1322 (W.D. Tex. 1979); *Williams v. Virginia Employment Commission*, 11 FEP Cases 232 (E.D. Va. 1975); [State] *Lindas v. Cady*, 150 Wis.2d 421, 441 N.W.2d 705 (1989); *Jesson, Inc. v. Tedder*, 481 So.2d 554 (Fla. App.Ct. 1986); *Peper v. Princeton*, 77 N.J. 55, 389 A.2d 465 (1978); and *Vason v. Carrano*, 31 Conn.Sup. 338, 330 A.2d 98 (1974).

The existence of this contrary authority, and the reasoning set out in the Seventh Circuit opinion, compel the conclusion that the Act contains no unmistakable implication of exclusive jurisdiction.

D. There is no incompatibility between concurrent state court jurisdiction and the federal interests expressed in Title VII. Concurrent jurisdiction allows the federal and state systems to function cooperatively and fulfills the Congressional scheme.

The Act mandates that state and federal authorities function cooperatively, and the exercise of concurrent jurisdiction is compatible with that mandate. Certainly there is no clear incompatibility between exercise of state court jurisdiction and fulfillment of the federal interests expressed in Title VII. If there is no clear incompatibility, then Yellow Freight has not overcome the presumption in favor of concurrent jurisdiction. *Gulf Offshore Company v. Mobil Oil Corp.*, *supra*, at 478, 2875. The factors used to test for compatibility, e.g., the desirability of uniform interpretation of the statute, the expertise of federal courts in federal law, and the assumed greater hospitality of federal courts to federal claims [*Gulf Offshore Company v. Mobil Oil Corporation*, *supra*, at 483, 484], were

recognized and applied by the Seventh Circuit [A-9], and that Court concluded that there was no incompatibility.

Practically speaking, concurrent jurisdiction is compatible with the goal of Title VII because that goal can best be achieved if the aggrieved employee can select the most amicable forum. If the state forum is selected, then the employee presumably believes that to be the most advantageous forum. In some areas, that may be the most convenient forum, the most expeditious forum, or the forum which will allow a better chance to obtain a lawyer. If the employer believes that such a forum will be disadvantageous for him, then the employer can always remove the case to federal court. 28 U.S.C. Sec. 1441(a),(b). [Petitioner claimed otherwise at 37, but did not point to any statute or rule that could bar removal.]

Access to a state forum can scarcely be argued to be incompatible with the intent of the statute when the objector can always remove the case to the federal system. Yellow Freight's contention is that state court involvement would be incompatible with the federal interest in preventing employment discrimination. It claims a concern that an employee filing in a state court might not receive all the benefits of a federal forum, e.g., uniformity, experienced judges, the possibility of being in a position to enforce the "speed up" procedure of 42 U.S.C. Secs. 2000e-5(f)(4),(5). That contention rings hollow and is exceedingly suspect. If an employee has any such fears, the employee can file in federal court; Title VII guarantees him that right. If the employee selects the state forum, and if the employer still has such munificent concerns about the enforcement rights of that employee, the employer can "assist" the employee by removing the case to federal court. From a practical perspective, there can be no incompatibility.

The Act itself presumes diverse forums. The preliminary investigation of discrimination claims is frequently handled by the state agencies under deferral policies. Indeed, the EEOC is allowed to defer entirely to the states in some worksharing circumstances and thus preclude any federal involvement whether administrative or judicial. As Senator Clark emphasized, the federal authorities were to "stay out of any State or locality which has an adequate law and is effectively enforcing it." Legis. His. at 3012, 110 Cong. Rec. 7216 (1964).

In this type of litigation, the questions to be litigated are usually ordinary, i.e., was there discrimination and, if so, what are the damages. There is no overriding issue which must be uniformly interpreted in order to secure the federal goal. This is different from the situation in *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922) [pet. br. at 12] where the Court found exclusive federal jurisdiction over antitrust actions; the basis for that holding may well have been the perceived need for uniformity in an area of federal policy.

The question for the Title VII court, whether state or federal, is simply whether the employment discrimination was on the basis of race, sex or the other banned categories. That is a simple fact question. Resolution of the facts may be complex, but the issue is one of fact and not of policy. For those reasons, state court adjudication will not be incompatible with federal interests. After all, the state courts are already making preclusive determinations under state laws. *Kremer v. Chemical Construction Corp.*, *supra*, at 485.

In the same vein, it is instructive to note that Congress gave an agency rather than the judiciary the power to

determine when and in which classes of cases it would act or defer to the states. Interpretive memorandum of Sen. Clark and Sen. Case, Legis. His. at 3045, 110 Cong. Rec. 7214 (1964). Having given such power to a political agency, it seems unlikely that Congress intended to bar a state court system from making similar fact determinations, especially where the findings of those courts are already controlling in federal court actions.

Yellow Freight's implication [pet. br. at 36] that the state courts are incompetent to adjudicate Title VII claims is belied by the fact that state court adjudication of federal rights, including federal civil rights, is common. Both age and race cases have been successfully heard in state courts. Age cases brought under the ADEA [Age Discrimination in Employment Act of 1967, 29 U.S.C. Sec. 621 *et seq.*] can be brought in any court. 29 U.S.C. Sec. 626(c)(1). ADEA and Title VII are closely related both in terms of their prohibitions and their history. See, e.g., *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972). Given those facts, the Seventh Circuit correctly determined [A-12] that it would be "incongruous to assume that state courts are incompetent to adjudicate Title VII claims."

Similarly, state courts have long heard federal civil rights actions brought under Section 1983 [42 U.S.C. Sec. 1983]. *Martinez v. State of California*, 444 U.S. 277, 283 [fn. 7], 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980); *Davis v. Towe*, 379 F.Supp. 536, 538 (E.D. Va. 1974) (aff'd 526 F.2d 588 without opinion); *Green v. Klinkofe*, 422 F.Supp. 1021, 1026 [fn. 12] (N.D. Ind. 1976); *Bostedt v. Festivals, Inc.*, 569 F.Supp. 503, 507 (N.D. Ill. 1983); *Luker v. Nelson*, 341 F.Supp. 111 (N.D. Ill. 1972). As the Seventh Circuit noted [A-10], there is no reason to believe that state courts would be hostile to civil rights claims brought under

Title VII, but receptive to similar civil rights claims brought under Section 1983 or the ADEA.

In reality, many state agencies and state courts have been at the task of enforcing civil rights in the employment arena for much longer than the federal courts. State FEP agencies and laws predated Title VII. Report of the Bar Association of the City of New York, Legis. His. at 3090, 110 Cong. Rec. 8456 (1964). As petitioner admits at 36, 38 states had FEP laws by 1972. State courts are presumed competent to interpret such state FEP laws [*Kremer v. Chemical Construction Corp.*, *supra*, at 478] and there is no reason to presume otherwise with respect to the similar discrimination restrictions contained in Title VII. Neither petitioner nor the literature suggests the existence of any current problem-brought about by state resolution of civil rights claims. That is the case not only because state courts are competent, but because state and federal procedures are similar. *Kremer v. Chemical Construction Corp.*, *supra*, at 495 (dissent).

Splitting the related discrimination actions and requiring them to run on parallel but separate state and federal tracks will only cause a duplication of effort and a further increase in the caseload of the already overburdened federal courts. The problem of heavy case loads in the courts in major metropolitan areas was mentioned as a consideration even in 1964. Explanation of amendments by Sen. Dirksen, Legis. His. at 3268, 110 Cong. Rec. 8194 (1964) [amendment limiting venue to place of occurrence in order to avoid concentration of filings in large metropolitan areas]. Nor should a claimant be placed in the "unenviable position of deciding whether to file his state law claims in state court and forego his Title VII claim, or to file a Title VII claim in federal court and relinquish his state law claims." *Quick v. General Motors Corpora-*

tion, 686 F.Supp. 1224, 1231 (fn. 1) (E.D. Mich. 1988) (dicta, suggesting that such a situation was contrary to the intent of *Alexander v. Gardner-Denver*, 415 U.S. 36, 48, 49, 94 S.Ct. 1011, 1020, 39 L.Ed.2d 147 (1974)).

Petitioner also relied on the views of the EEOC in other cases. For example, the EEOC filed a brief in *Pirela v. Village of North Aurora*, No. 89-1231, pending in the Seventh Circuit. There, the EEOC's position was taken to avoid claim preclusion and thus to expand opportunities for litigants with Title VII claims. Its position there is not surprising, given the different strategy and focus of that case. It did not file in this action, nor did the Solicitor General intervene, and its position in another matter cannot fairly be read to reflect the position it might have adopted if it had entered this case. By way of comparison, the EEOC filed an amicus brief supporting concurrent jurisdiction in *Peterson v. Eastern Airlines, Inc.*, 20 FEP Cases 1322 (W.D. Tex. 1979).

Yellow Freight contends that concurrent jurisdiction is incompatible because it is illogical [pet. br. at 33], it would lead to non-uniformity [pet. br. at 35], federal law would overwhelm state law [pet. br. at 35], and state court judges are not competent [pet. br. at 36]. It first argues that it is illogical to interrupt the state course of the case by sending the employee to the EEOC if that employee must then go back into the state system. That misses the whole point of Title VII. The intent is to resolve cases by conciliation, not to litigate them. Statement of Sen. Case, Legis. His. at 3277, 110 Cong. Rec. 7242 (1964). Mediation and conciliation were believed to be the most effective remedies. Report of House Committee on Education and Labor re H.R. 10144 (1962), Legis. His. at 2160; *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970). The process will be "interrupted" by

EEOC conciliation regardless of whether there is concurrent or exclusive jurisdiction, except where the EEOC has turned the entire process over to the state.

The uniformity and competency objections have already been addressed. *Ante*, at 25, 26. These cases basically involve resolution of whether the facts show discrimination or questions of damages, as in the instant case where liability was admitted and the only dispute was the amount of damages. If uniformity is not a problem in other federal claims brought in state courts under concurrent jurisdiction, then there is no reason to foresee difficulty with Title VII cases.

Yellow Freight's suggestion that state court judges are less competent because they only review rather than try cases de novo also is unfounded. That is the equivalent of arguing that an appellate court is less competent to rule on a case because it is limited to review under certain constrictions. As to petitioner's other attack on competency, it is true that most state court judges do not enjoy life tenure. However federal magistrates who, as in this case, try many of the Title VII actions, also do not enjoy that privilege. Yet no one would challenge their competency.

Petitioner's suggestion that state law would be overwhelmed by federal law is equally unfounded. The laws and regulations are essentially the same; they bar employment discrimination. State court enforcement of the federal civil rights provided in Section 1983 and the ADEA has not overwhelmed state law development in those areas. There is no reason to believe and no evidence to show that this would occur if Title VII civil rights claims were similarly brought in state court.

Because the same policy considerations underlie both state and federal FEP laws, because state courts have historically adjudicated these types of civil rights matters without difficulty, and because the employer can remove a case to a federal forum, concurrent jurisdiction is compatible with the aims of Title VII.

II.

IF THIS COURT DENIES CONCURRENT JURISDICTION, THE FINDING IN FAVOR OF RESPONDENT COLLEEN DONNELLY MUST NONETHELESS BE AFFIRMED. YELLOW FREIGHT WAIVED ANY LIMITATION DEFENSE, THE COMPLAINT FILED IN THE FEDERAL COURT AFTER REMOVAL RELATED BACK TO THE INITIAL FILING, AND THE LIMITATION PERIOD WAS THUS EQUITABLY TOLLED.

This point need be considered only if this Court limits jurisdiction over Title VII actions to the federal courts. In that event, the finding in favor of respondent should nonetheless be affirmed. Yellow Freight waived any defense that it might have had based upon the expiration of the 90 day limitation period. In the alternative, the filing of the amended complaint in federal court related back to the timely filed state court action, and the running of the limitation period was thus equitably tolled.

Donnelly filed her complaint in the state court in 1985. [J.A. 5]. After an unusual state court pleading scenario [A-16], Yellow Freight's motion to dismiss was denied by the district court and petitioner filed an answer and affirmative defenses. If Yellow Freight desired to follow through on its contention that the Title VII action was untimely because the specific allegation of a Title VII violation was filed more than 90 days after receipt of the right to sue letter, it had to raise that in its affirmative

defenses. The time limitation [42 U.S.C. Sec. 2000e-5(f)(1)] is akin to a statute of limitations [*Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1070 (5th Cir. 1981); cf. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982)], and such defenses can of course be waived. Expiration of a limitation period is an affirmative defense and must be pleaded. F.R.C.P. 8(c).

In this instance, petitioner did not include that defense. Petitioner did allege that the action was "barred as untimely filed pursuant to Section 706(j) of Title VII (42 U.S.C. Section 2000(e)-5(j))." However, that section has nothing to do with the 90 day limitation period; it relates to the appeal process. Petitioner's defenses were not amended to add reference to the 90 day limitation period. Yellow Freight admitted liability [A-26], but offered no evidence and obtained no ruling as to any affirmative defense. For those reasons, petitioner waived the contention that the action was not timely filed. See *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 163, 104 S.Ct. 1723, 1731, 80 L.Ed.2d 196 (1984) (dissent). This point was not raised below, but a judgment can be affirmed on any basis found in the record. *Ryerson v. United States*, 312 U.S. 405, 408, 61 S.Ct. 656, 658, 85 L.Ed. 917 (1941).

Respondent must also prevail, regardless of the ruling on the jurisdictional question, because her Title VII action in federal court relates back to the original action. It is undisputed that the state court complaint was filed within 90 days of receipt of the notice of the right to sue. That complaint alleged sex discrimination on the part of Yellow Freight and attached thereto the two right to sue letters from the EEOC. [J.A. 5-16]. The charges underlying those letters had of course been served earlier on Yellow Freight.

After the case was removed to federal court, Donnelly filed an amended complaint which specifically alleged violation of Title VII of the Civil Rights Act of 1964. [J.A. 42-47].

That amended complaint, although filed more than 90 days after receipt of the right to sue letters, related back to the timely filed complaint. F.R.C.P. 15(a). For that reason, the Seventh Circuit ruled that respondent's Title VII action was timely filed. [A-15 to A-17]. In *Paskuly v. Marshall Field & Company*, 646 F.2d 1210, 1211 (7th Cir. 1981), plaintiff filed a complaint alleging sex discrimination. More than 90 days after receiving her right to sue letter, she amended her complaint to add other plaintiffs in a class action. The court affirmed the finding that the otherwise late amended complaint related back to the original action, noting that the EEOC filing and the original complaint each put the defendant on notice that it would be required to defend its employment practices.

In *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1070 (5th Cir. 1981), plaintiff filed a discrimination action based solely on Section 1981, which the court found was barred by the Eleventh Amendment. The court there held that an amended complaint raising Title VII claims related back to the first complaint even though the original complaint itself was barred. As in the instant case, both claims arose out of the same occurrence. The amended action was held to be timely. That court relied in part on *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1187 (5th Cir. 1980) where the court allowed an amended complaint raising Title VII claims to relate back to the first complaint even though the first action was based only on Section 1981 and had itself been time barred. The Seventh Circuit's finding in this case that the amended complaint

related back [A-15] is thus applicable even if Donnelly's original complaint did not specifically allege violation of Title VII.

Donnelly's complaint was thus timely filed because the 90 day filing limitation was equitably tolled. Yellow Freight was obviously timely informed of Donnelly's charges by virtue of the EEOC charge notice. The original complaint clearly alleged sex discrimination and attached the right to sue letters which refer to Title VII. Donnelly attempted to raise the specific Title VII allegations immediately in the state court [J.A. 24-35], but the case was removed by defendant before the proposed amendment could be ruled on. The first complaint and the amended complaint are both based on the same facts. Her filing in state court was done in good faith. Both the District Court and the Seventh Circuit wherein the state court is located confirmed her right to file in state court, and numerous other decisions supported her selection of that forum.

Under similar circumstances, the court in *Fox v. Eaton Corporation*, 615 F.2d 716, 719 (6th Cir. 1980), cert. den. 450 U.S. 935, 101 S.Ct. 1401 (1981), held that the state court filing tolled the limitation period for Title VII claims. Moreover, the plaintiff in *Valenzuela* was also allowed the benefit of equitable tolling. *Valenzuela II*, in an extensive review of that principle, cited the *Fox* rationale with approval and relied on *Baldwin* and *Zipes*. *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986). Respondent merits that same protection in this case.

Respondent requests that this Court either find that the limitation period was equitably tolled, or remand the matter to give the Seventh Circuit further opportunity to consider this issue.

CONCLUSION

For the reasons stated, respondent Colleen Donnelly requests that this Court find that state courts have concurrent jurisdiction over claims arising under Title VII and that the judgment below be affirmed. In the event that this Court determines that Congress intended Title VII jurisdiction to be limited to the federal courts, respondent requests that the judgment be affirmed for the alternative reason provided in Point II or, in the alternative, that the case be remanded for further consideration of that contention.

Respectfully submitted,

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